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No. 85-1728

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

J. PLACIDO GARCIA.

Petitioner,

v.

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, LEO LUJAN, MARGENE HARRIS, DANIEL TRUJILLO and DAVID SHORTESS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DIANE FISHER
MICHAEL J. CONDON
JO SAXTON BRAYER
BRUCE HALL, Counsel of Record

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900

Counsel for Respondents

June 26, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

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QUESTIONS PRESENTED

1. Does a plaintiff's voluntary and unilateral decision at trial to dismiss claims against certain defendants in their individual capacities preclude the public defendant and defendants in their official capacities from arguing eleventh amendment immunity on appeal where (1) the pleadings and pretrial orders raise the eleventh amendment defense; (2) neither defendants nor their counsel participate in the decision to dismiss the claims against the defendants individually; and (3) the only reference to immunity made by defendants' counsel in connection with this dismissal occurrs some time after the plaintiff's decision has been announced and does not expressly relate to or reference the eleventh amendment?

2. When a particular state is found to have established local school boards as arms of the state under the analysis of state organization required by *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), are these local school boards and their members in their official capacities entitled to eleventh amendment immunity from suits in federal court seeking money damages?

TABLE OF CONTENTS

Page No.

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

CONSITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED:

I. Neither the Decision Below Nor the Record in This Case Raises Petitioner's First Question Presented. 6

II. The Decision of the Court of Appeals on the Issues of Waiver and Estoppel Is Consistent with Decisions of This Court. 8

III. The Court of Appeals' Decision Properly Applied and Is Consistent with Decisions of This Court Regarding Eleventh Amendment Immunity. 14

CONCLUSION 24

Appendix A Transcript of Proceedings, Nov. 6, 1981. ..... App. 1

Appendix B Transcript of Proceedings, Nov. 9, 1981. ..... App. 5

Appendix C Transcript of Proceedings, Nov. 10, 1981. ..... App. 8

Appendix D Complaint in *Garcia v. Rodey, Dickason, Sloan, Adkin* [*sic*] *& Robb, P.A.* ..... App. 10

Appendix E Constitutional Provisions and Statutes. ..... App. 17

TABLE OF AUTHORITIES

Page No.

CASES:

Alabama v. Pugh, 438 U.S. 781 (1978) 9

Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142 (1985) 9, 10

Bertot v. School District No. 1, 613 F.2d 245 (10th Cir. 1979) 22

Carey v. Quern, 588 F.2d 230 (7th Cir. 1978) 22

Clark v. Barnard, 108 U.S. 436 (1883) 11

Cockrell v. Curtis, No. 83-0031 JB (D.N.M. Aug. 4, 1983) 16

Di Frischia v. New York Central Railroad Co., 279 F.2d 141 (3d Cir. 1960), *overruled, Rubin v. Buckman*, 727 F.2d 71 (3d Cir. 1984) 12

Edelman v. Jordan, 415 U.S. 651 (1974) 8, 9, 10, 11, 13, 20

Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association, 450 U.S. 147 (1981) 9

Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945) 9, 10, 11

Garcia v. Board of Education, 777 F.2d 1403 (10th Cir. 1985) ..... *passim*

Hall v. Medical College of Ohio at Toledo, 742 F. 2d 299 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 796 (1985) 22

Harris v. Tooele County School District, 471 F.2d 218 (10th Cir. 1973) 22

Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977) 22

McAtee v. Gutierrez, 48 N.M. 100, 146 P.2d 315 (1944) 21

TABLE OF AUTHORITIES—Continued

Page No.

McGhee v. Draper, 639 F.2d 639 (10th Cir. 1981) 22

McWhorter v. Board of Education, 63 N.M. 421, 320 P.2d 1025 (1958) 17

Maestas v. Board of Education, No. 82-1452 M (D.N.M. June 23, 1983), *aff'd*, 749 F.2d 591 (10th Cir. 1984) 16

Maestas v. Board of Education, 749 F.2d 591 (10th Cir. 1984) 5

Martinez v. Board of Education. No. 81-0995 M (D.N.M. Apr. 21, 1983), *aff'd*, 748 F.2d 1393 (10th Cir. 1984) 16

Martinez v. Board of Education, 748 F.2d 1393 (10th Cir. 1984) 5, 14, 15, 16, 18, 19, 20, 21, 22

Monell v. Department of Social Services, 436 U.S. 658 (1978) 14, 23

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 14, 15, 16, 17, 21, 22

Naranjo v. Espanola School Board of Education, No. 82-916 JB (D.N.M. Mar. 20, 1983) 5, 16, 20

National Advertising Co. v. State ex rel. State Highway Commission, 91 N.M. 191, 571 P.2d 1194 (1977) 12

Patsy v. Board of Regents, 457 U.S. 496 (1982) 9, 15

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 8, 11, 12, 13, 20

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) 10

Prince v. Board of Education, 88 N.M. 548, 543 P.2d 1176 (1975) 18

TABLE OF AUTHORITIES—Continued

Page No.

Quern v. Jordan, 440 U.S. 332 (1979) 23

Sosna v. Iowa, 419 U.S. 393 (1975) 9

Terrell v. United States, 783 F.2d 1562 (11th Cir. 1986) 13

Unified School District No. 480 v. Epperson, 551 F.2d 254 (10th Cir. 1977), *vacated on other grounds*, 435 U.S. 948 (1978) 17, 20, 22, 23

United Carolina Bank v. Board of Regents of Stephen F. Austin State University, 665 F.2d 553 (5th Cir. 1982) 22

Westerman v. City of Carlsbad, 55 N.M. 550, 237 P.2d 356 (1951) 13

Younger v. Harris, 401 U.S. 37 (1971) 22

MISCELLANEOUS:

Fed. R. Civ. P. 16 13

N.M. Code of Prof. Resp. R. 5-105 6

N.M. Const. art. VIII, § 7 21

N.M. Const. art. IX, § 11 ..... 17, 19

N.M. Const. art. IX, § 12 17

N.M. Const. art. XII, §§ 3, 6 ..... 17, 18

N.M. Stat. Ann. § 13-6-2 (1978) 19

N.M. Stat. Ann. § 22-1-1 to 22-2-16 (1978 & Supp. 1985) 18

N.M. Stat. Ann. § 22-2-2 (Supp. 1985) 18

N.M. Stat. Ann. § 22-2-8 (1978) 18

N.M. Stat. Ann. § 22-8-1 to -42 (1978 & Supp. 1985) 18

TABLE OF AUTHORITIES—Continued

Page No.

N.M. Stat. Ann. § 22-8-3 and -4(A) (1978 & Supp. 1985) 19

N.M. Stat. Ann. § 22-8-5, -10 and -11 (1978) 19

N.M. Stat. Ann. § 22-8-12 (1978) 19

N.M. Stat. Ann. § 22-8-35 (1978) 19

N.M. Stat. Ann. § 22-8-37 (1978) 19

N.M. Stat. Ann. § 22-18-9, 22-19-6 and -7 (1978) 19

N.M. Stat. Ann. § 22-19-8 (1978) 19

N.M. Stat. Ann. § 22-20-1 to -3 (1978) 19

N.M. Stat. Ann. § 37-7-7 (1978) 21

N.M. Stat. Ann. § 41-4-1 to -29 (1978 & Supp. 1985) 20, 21

N.M. Stat. Ann. § 41-4-4(F) (1978) 10

N.M. Stat. Ann. § 41-4-20 (1978) 20, 21

N.M. Stat. Ann. § 41-4-28(C) (1978) 10, 20

S. Ct. R. 21.5 8

42 U.S.C. § 1983 2

U.S. Const. amend. XI ..... *passim*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Board of Education of the Socorro Consolidated School District and Leo Lujan, Margene Harris, Daniel Trujillo, and David Shortess, members of the Board of Education of the Socorro Consolidated School District, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case, reported at 777 F.2d 1403 (1985).

CONSTITUTIONAL PROVISIONS AND STATUTES

The petition for writ of certiorari involves consideration of the following provisions: U.S. Const. amend. XI; 42 U.S.C. § 1983; N.M. Const. art. VIII, § 7; art. IX, § 11; art. XII, §§ 1, 2, 3, 4, 6 and 7; N.M. Stat. Ann. §§ 22-1-2; 22-2-1, -2, -8 and -14; 22-5-4; 22-8-3 to -12.1; 22-8-14 to -16; 22-8-25, -30, -35 and -37; 22-18-9; 22-19-6 to -8; 22-20-1 to -3; 41-4-4, -20 and -28 (1978 & Supp. 1985). The full text of these provisions is set forth in the Appendix.

———o———

STATEMENT OF THE CASE

Petitioner J. Placido Garcia brought this action under 42 U.S.C. § 1983 against the Board of Education of the Socorro Consolidated School District ("Board") and Board members Leo Lujan, Margene Harris, Daniel Trujillo, and David Shortess in both their individual and official capacities. The action was instituted following the Board's decision not to renew Petitioner's employment contract as the Board's Superintendent of Schools. In his complaint, Petitioner alleged, *inter alia*, that he had been deprived of liberty without due process of law by the Board's distribution of a statement detailing the reasons for its decision not to renew Petitioner's contract.[1]

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[1] Although the Board initially had not publicized these reasons, it did so after local newspapers published statements made by Petitioner that attributed the Board's action to Petitioner's refusal to perform an illegal act. 777 F.2d at 1405. The reasons cited by the Board included conduct detri-

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Respondents raised immunity under the eleventh amendment to the United States Constitution, U.S. Const. amend. XI, as a defense to Petitioner's claim for damages in their answer to the complaint, in their answers to the first and second amended complaints, in the initial pretrial order, and in the final pretrial order. 777 F.2d at 1405. The district court never ruled on the issue. *Id.*

The trial of this action commenced on November 5, 1981. On the second day of trial, the district judge suggested to Petitioner's counsel that the case would be more understandable to the jury if Petitioner dropped his claims against the Board members in their individual capacities. Respondents' counsel took no part in this discussion and the matter was to be decided by Petitioner's counsel over the forthcoming weekend. App. 1-4.[2] On the following Monday, Petitioner's counsel informed the court that he had consulted with his co-counsel and with Petitioner, and that Petitioner had decided to dismiss these claims against the Board members. There was no consultation or discussion with Respondents or their counsel with respect to this decision, other than an acknowledgment by Respondents'

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mental to staff morale, difficulties in working with Petitioner, and dissatisfaction among constituents. *Id.* There is substantial dispute as to whether the Board's statement "stigmatized" Petitioner. *See* Pet. at 4. Respondents argued on appeal that the district court erred in failing to direct a verdict on this claim; however, the court of appeals did not reach this issue due to its dismissal of Petitioner's claims on eleventh amendment grounds.

[2] Because critical and unique facts essential for consideration of the petition were ignored by Petitioner, relevant portions of the record are set forth in the Appendix.

counsel that "his insurer" had no objection to the dismissal of these claims. App. 5-6.

During a conference on jury instructions held on November 10, 1981, the day after Petitioner announced his decision to dismiss the claims against the Board members individually, the following exchange occurred:

> THE COURT: ...
>
> Also, let's see; there was one other item I wanted to— Also, the instructions are drafted as against the Defendts strictly in their official capacities. I understood that's the way the Plaintiff wanted it. Therefore, that takes out any issue of punitive damages and also any issue of good faith. So if there's no hooker— There's no problem; if the Plaintiff is entitled to a verdict, it's recoverable. I assume that's true.
>
> MR. FERGUSON [Respondents' Counsel]: That's true, Your Honor.
>
> (Laughter.)
>
> THE COURT: I mean if the Plaintiff were recovering, then all at once the school district will not respond or claim some kind of immunity or something.
>
> MR. FERGUSON: No. They probably would not have the money, but there's no problem with that.

App. 9. This is the *only* portion of the record on which Petitioner relies in claiming that Respondents expressly waived or are estopped from asserting their eleventh amendment rights.[3]

The case was submitted to the jury on Petitioner's liberty interest claim against the Board and the members

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[3] Petitioner's claim that the defense was expressly waived by the participation of Respondents' counsel in this exchange is raised for the first time in his petition before this Court. See n.8, *infra*.

of the Board in their official capacities. The jury returned a verdict for Petitioner and judgment was entered thereon.

Respondents appealed to the United States Court of Appeals for the Tenth Circuit, but did not argue eleventh amendment immunity in their initial briefs. Prior to oral argument the United States District Court for the District of New Mexico rendered a decision in which it held that a New Mexico school board is an "arm of the state" for purposes of the eleventh amendment. *Naranjo v. Espanola School Board of Education,* No. 82-916 JB (D.N.M. Mar. 20, 1983). In supplemental briefs and at oral argument the parties addressed the issues of (1) whether eleventh amendment immunity applies to New Mexico school boards; (2) if so, whether the defense was waived as untimely; and (3) whether Respondents were estopped from asserting the defense under the facts of the case. *See* 777 F.2d at 1405-07.

The court of appeals held that Respondents were entitled to eleventh amendment immunity in accordance with decisions rendered by the court during the pendency of the appeal, *Martinez v. Board of Education,* 748 F.2d 1393 (10th Cir. 1984); *Maestas v. Board of Education,* 749 F.2d 591 (10th Cir. 1984). The court further held that Respondents had not waived and were not estopped from relying on this defense.[4]

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[4] Petitioner filed his petition for writ of certiorari on April 23, 1986. In May, 1986, Petitioner and his counsel, as Plaintiffs, commenced an action in state court against Respondents' counsel seeking damages allegedly arising out of Re-

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REASONS WHY THE PETITION SHOULD BE DENIED

I. Neither the Decision Below Nor the Record in This Case Raises Petitioner's First Question Presented.

The first Question Presented by Petitioner is whether Respondents waived or are estopped from asserting an eleventh amendment defense

> when the board stipulates that it will not raise any immunity defenses should the Plaintiff in a 42 U.S.C. § 1983 action agree to dismiss the complaint against members of the board in their individual capacities.

Pet. at i. This question assumes a fact neither established nor supported by the record, i.e., that Respondents stipulated to anything. The Tenth Circuit did not consider the question as presented, and, moreover, the facts of record will not support a determination of the question by this Court.

Petitioner mischaracterizes his unilateral decision to dismiss his claims against the Board members in their individual capacities by implying that this decision was part

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spondents' assertion of eleventh amendment immunity in these proceedings. App. 10. Pursuant to the New Mexico Code of Professional Responsibility, Respondents' counsel fully disclosed the conflict of interest issues raised by their continued representation of Respondents in light of the initiation of the state court action. N.M. Code Prof. Resp. R. 5-105. Respondents have consented to counsel's continued representation before this Court.

of a bargain struck between the parties. To the contrary, Petitioner made his decision to dismiss these claims in response to the trial court's suggestion that it would simplify the case to do so. App. 1-6. As the court of appeals recognized, "Plaintiff's attorney, noting that he had conferred with his client and with co-counsel, informed the court that plaintiff wanted to drop the claim against defendants in their individual capacities. The defense attorney's only participation in this exchange was to state that he and the defendants' insurer had no problem with this decision." 777 F.2d at 1406; *see* App. 6.

The record thus shows that Respondents never stipulated that they would not raise an eleventh amendment immunity defense in exchange for an agreement to dismiss claims against the Board members in their individual capacities. The only statement by Respondents' counsel on which Petitioner relies was made the day *after* the announcement of Petitioner's decision and in response to a general question regarding immunity. No express reference to the eleventh amendment or to sovereign immunity can be found in the relevant portions of the transcript. The court of appeals decision does not refer to any stipulation because none has ever been established in the context urged by Petitioner.

Without some assurance from the record that a stipulation was in fact made, Petitioner's first Question Presented raises only a hypothetical issue. In the context of the record, the Question could be resolved only by rendering an impermissible advisory opinion. In addition, Petitioner's failure to set forth fully and accurately in his petition the matters essential to an adequate understand-

ing of this point justifies denial of his petition pursuant to Rule 21.5 of the Supreme Court Rules, S. Ct. R. 21.5.

II. The Decision of the Court of Appeals on the Issues of Waiver and Estoppel Is Consistent with Decisions of This Court.

Petitioner invites this Court to grant the petition by misrepresenting the holding of the court of appeals on the issue of waiver. Petitioner claims that the court below ruled that the doctrine of waiver "cannot apply to the eleventh amendment defense," Pet. at 14, when, in fact, the court did not so rule. The court of appeals properly recognized that eleventh amendment immunity may be waived, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974), but found that no waiver occurred under the facts of this case because the eleventh amendment issue was timely raised. 777 F.2d at 1405-07. Nothing in the court's opinion "flatly contradicts" any decision of this Court. *See* Pet. at 14. *See* 777 F.2d at 1405-07.

The question raised by the decision below is not, as Petitioner contends, whether an eleventh amendment defense can ever be waived, but rather, under the unique facts of this case, whether a waiver occurred. Because the decision below is limited to these unique facts, it does not merit review by this Court.

Petitioner's only contention in the court of appeals regarding waiver was that Respondents' request for an appellate ruling on the eleventh amendment issue was untimely. 777 F.2d at 1405-06. In its holding that the defense was timely raised, the court of appeals' decision accurately reflects the decisions of this Court holding that an

eleventh amendment defense may be raised at any stage of the proceedings, *see, e.g., Edelman v. Jordan; Ford Motor Co. v. Department of Treasury,* 323 U.S. 459 (1945); *see also Alabama v. Pugh,* 438 U.S. 781 (1978), and may be argued at the appellate level even if it was raised but abandoned in the district court, *Sosna v. Iowa,* 419 U.S. 393, 396 n.2 (1975); *see Patsy v. Board of Regents,* 457 U.S. 496, 515 n.19 (1982).[5]

Without considering whether the exchange between the trial court and Respondents' counsel on November 10 amounted to an express waiver of eleventh amendment immunity, see n.8, *infra,* the court of appeals held that Respondents' attorney lacked authority to waive the defense under New Mexico law. 777 F.2d at 1406-07. This holding, however, is nothing more than a recognition of the principle that "it is not to be presumed in the absence of clear language to the contrary, that [the state legislature] conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases." *Ford Motor Co. v. Department of Treasury,* 323 U.S. at 468; *see Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association,* 450 U.S. 147, 150 (1981).

In *Ford Motor,* this Court held that a state's attorney general lacked authority to waive eleventh amendment im-

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[5] Petitioner does not request that this Court reconsider its prior rulings, but rather asserts that this case factually falls within the rule that a state may expressly waive its immunity under the eleventh amendment. *See Atascadero State Hospital v. Scanlon,* 105 S. Ct. 3142, 3145 n.1 (1985). The defect in Petitioner's argument is his assumption that an "express waiver" occurred. See text at n.8.

munity where the state had not explicitly granted such authority by statute. *Id.* The rule adopted in *Ford Motor* applies with full force here.[6] The court below correctly recognized that the New Mexico Legislature has not waived immunity to suit in federal court, and has not granted a a school board's attorney the discretion to do so. 777 F.2d at 1406-07. Indeed, the New Mexico Legislature has specifically directed that statutory provisions relating to exceptions to immunity and payment of certain judgments, including § 1983 judgments, shall not be construed "as a waiver of the state's immunity from suit in federal court under the eleventh amendment to the United States constitution." N.M. Stat. Ann. § 41-4-4(F) (1978); *see also* N.M. Stat. Ann. § 41-4-28(C) (1978).

Waiver of eleventh amendment immunity will not be lightly inferred and must be in clear and unequivocal language. *Atascadero State Hospital v. Scanlon,* 105 S. Ct. at 3145 n.1; *Edelman v. Jordan; Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959). Where, as here, the New Mexico Legislature has specifically declined to

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[6] Petitioner's assertions at page 20 of his Petition that the Indiana statutes at issue in *Ford Motor* "specifically restricted the attorney general in his representation of the state" and that the Court's holding was "due to this local statutory restriction" have no basis in the Court's opinion. *See* 323 U.S. at 468. The Court in *Ford Motor* was concerned not with whether the attorney general had been refused authority to consent to suit, but with whether such authority had been affirmatively granted.

waive immunity, no authorization of Respondents' counsel to consent to suit in federal court can be inferred.[7]

Petitioner now seeks to circumvent this Court's decision in *Ford Motor* by claiming that Respondents' counsel explicitly and expressly waived Respondents' eleventh amendment defense, and that even if this expression does not constitute an effective waiver, Respondents should nonetheless, based on this expression, be estopped from asserting the defense. Petitioner's argument, however, borders on the absurd. The sum and substance of the content of the claimed "express waiver" is the exchange cited between the trial court and Respondents' counsel on November 10. To find that this exchange, in which the eleventh amendment is not even mentioned, rises to the level of a knowing and intentional waiver of a constitutional right (with or without authority) would preset a complete and unreasoned departure from the decisions of this Court holding that "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)); *Pennhurst*, 465 U.S. at 99.[8]

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[7] Petitioner's reliance on *Clark v. Barnard*, 108 U.S. 436 (1883), is misplaced. In that case, the state voluntarily entered the federal forum, initiating its own involvement in federal litigation. This situation, properly held to reflect a consent by the state to the jurisdiction of the court, is a far cry from the situation presented here where the Respondents were summoned before the court as unwilling defendants.

[8] That the November 10 exchange is not "clear and unequivocal" is evidenced by the fact that Petitioner himself ap-

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Petitioner's argument that Respondents are "estopped" from asserting the eleventh amendment defense must also fail.[9] "[C]onsiderations of judicial economy, convenience, and fairness to litigants" are policy considerations that "cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a state."[10] *Pennhurst*, 465 U.S. at 121-23. Although application of the doctrine of estoppel in the context of this case would be completely inconsistent with this Court's recognition that eleventh amendment immunity is in "the

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parently did not recognize it as such. It was only after the Tenth Circuit noted the exchange in its opinion that Petitioner attached any significance to it. Petitioner never relied on or even cited this exchange in any of the briefs submitted to the Tenth Circuit, in which the Petitioner argued only that he dismissed the individual claims "in implicit reliance on the fact that no Eleventh Amendment defense had been raised," and that Respondents "remained silent as to the Eleventh Amendment . . . at the time Defendants [sic] election not to proceed . . . was made." Petitioner's "Memorandum of Points and Authorities on Eleventh Amendment Issues" at 3-4. *But see* Final Pretrial Order, Record on Appeal, Vol. I, p. 108; 777 F.2d at 1405.

9 Petitioner relies on New Mexico decisions holding that estoppel may, under limited circumstances, be applied against the state. Pet. at 21-23. None of these cases, however, involved a claim of estoppel with respect to the state's assertion of a constitutional right, and in each case cited in which estoppel was found to apply, the action of the state was express, clear, and unequivocal. *See National Advertising Co. v. State ex rel. State Highway Commission*, 91 N.M. 191, 194, 571 P.2d 1194, 1197 (1977) ("estoppel is not to be applied except in exceptional situations where there is a 'shocking degree of aggravated and overreaching conduct' ").

10 Petitioner's reliance on *Di Frischia v. New York Central R.R. Co.*, 279 F.2d 141 (3d Cir. 1960), is misplaced. That case has been overruled. *Rubin v. Buckman*, 727 F.2d 71, 72 (3d Cir. 1984).

nature of a jurisdictional bar," *Pennhurst*, 465 U.S. at 100, and its holding that "constructive consent" has no place in eleventh amendment jurisprudence, *Edelman*, 415 U.S. at 673, *see Terrell v. United States*, 783 F.2d 1562, 1564-65 (11th Cir. 1986), this question need not be reached as the facts of this case simply will not support an estoppel argument.[11] *See* Point I, *supra*.

The court of appeals properly held that Respondents were entitled to invoke their eleventh amendment defense on appeal. In so doing, the court correctly ruled that the eleventh amendment defense was timely raised and that Respondents were not estopped from relying on the defense. Because the rulings of the court below are consistent with decisions of this Court and because the issues actually presented by the record are factually unique in nature and not sufficiently compelling to merit review, the petition for a writ of certiorari should be denied.

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[11] A party claiming estoppel must show (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change the party's position prejudicially. *Westerman v. City of Carlsbad*, 55 N.M. 550, 556, 237 P.2d 356, 359 (1951). In this case, Petitioner claims to have acted "in reliance" on a statement that was not made until *after* the action at issue was taken. Further, at the time Petitioner announced his decision to dismiss the claims against the individuals, the final pretrial order which governed the conduct of the trial, see Fed. R. Civ. P. 16, reflected Respondents' claim of eleventh amendment immunity. 777 F.2d at 1405. Petitioner did not ask for a determination of this issue before he made his decision; surely it is not the role of Respondents' counsel to advise Petitioner of its consequences.

III. The Court of Appeals' Decision Properly Applied and Is Consistent With Decisions of This Court Regarding Eleventh Amendment Immunity.

Petitioner again misstates the ruling of the court of appeals by claiming that the court held that "the eleventh amendment is an absolute jurisdictional bar to suits against school boards in federal court." Pet. at 24. A review of the court of appeals' opinion conclusively demonstrates that it did not so rule, and that the holding of the court is limited to New Mexico school boards and based on the unique character of these boards as creatures of New Mexico law. Although the court of appeals did not conduct an extended analysis of the availability of eleventh amendment immunity to New Mexico school boards in this case, the court undertook a detailed analysis of the identical issue in *Martinez v. Board of Education*, where the court applied the analysis approved by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and concluded that New Mexico school boards "are indeed arms of the state system of education as provided in the state constitution." 748 F.2d at 1396. *See also Monell v. Department of Social Services*, 436 U.S. 658 (1978). Because the decision below involves nothing more than the application of an analysis approved by this Court to a unique set of facts, it does not merit review by way of certiorari.

In *Mt. Healthy*, this Court considered whether a local Ohio school board was entitled to eleventh amendment immunity in a lawsuit that arose out of the local board's refusal to renew the plaintiff's contract. The Court stated the issue as

> whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law.

429 U.S. at 280. After reviewing the pertinent state statutes, the Court concluded that "[o]n balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State." *Id.* Under *Mt. Healthy,* a federal court considering the question of eleventh amendment immunity for a local school board must therefore inquire into the nature of that school board within the particular state's constitutional and statutory scheme in determining whether, on balance, the board is entitled to eleventh amendment immunity. Because of the factual nature of and the importance of state law to such an inquiry, the resolution of whether any given entity is entitled to immunity is unique to each state and to each entity within that state claiming the right to invoke the eleventh amendment. *See Patsy v. Florida Board of Regents,* 457 U.S. at 515 n.19 (noting "the importance of state law in analyzing Eleventh Amendment questions" and the "competing questions of fact and state law necessary to resolve the Eleventh Amendment issue").

The court in *Martinez,* after an extensive analysis of the organization, operation and financial structure of New Mexico's public school system, found that the State of New Mexico exercised "control, management and direction" over local school boards "well beyond the 'some

guidance' referred to in *Mt. Healthy City Board of Education v. Doyle,"* 748 F.2d at 1394. The court concluded that New Mexico school boards are entitled to eleventh amendment immunity.

> Considering that the New Mexico State Board of Education has the "control," the "management" and "direction" of all public schools; that this authority has been implemented by the legislature in detail; that the fiscal-budgetary matters for the districts are fully controlled by the state; that the state taxing method for schools is a statewide system of state taxes; that the funds so generated for the schools are applied on a formula to equalize funding among the districts and basically on school attendance, we must hold that the local boards are indeed arms of the state system of education as provided in the state constitution. The local boards, of course, do perform significant functions as an arm of the state government and the members make a very important contribution to the educational system.

748 F.2d at 1396. The Tenth Circuit's decision in this case thus reflects a proper, accurate, and detailed application of the analysis required by this Court's decisions.[12] *See*

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[12] Federal district courts considering the question of the nature of New Mexico local school boards have uniformly held that the boards are arms of the state and therefore entitled to eleventh amendment immunity. *Cockrell v. Curtis,* No. 83-0031 JB (D.N.M. Aug. 4, 1983); *Maestas v. Board of Education,* No. 82-1452 M (D.N.M. June 23, 1983), *aff'd,* 749 F. 2d 591 (10th Cir. 1984); *Martinez v. Board of Education,* No. 81-0995 M (D.N.M. Apr. 21, 1983), *aff'd,* 748 F.2d 1393 (10th Cir. 1984); *Naranjo v. Espanola School Board,* No. 82-916 JB (D.N.M. Mar. 20, 1983). In each case, the court examined the nature of the entity created by New Mexico state law and determined that school boards are arms of the state for eleventh amendment immunity purposes.

Mt. Healthy; see also Unified School District No. 480 v. Epperson, 551 F.2d 254 (10th Cir. 1977), *vacated on other grounds*, 435 U.S. 948 (1978).

In the context of the law establishing local school boards in New Mexico, the nature of these boards as "arms of the state" is clear. New Mexico considers its school districts to be "part of the state government incorporated for convenience only and not intended for a separate existence."[13] *McWhorter v. Board of Education*, 63 N.M. 421, 424-25, 320 P.2d 1025, 1027-28 (1958). In *McWhorter*, the New Mexico Supreme Court held that a school district could not be sued, absent its consent, under New Mexico's workers compensation laws, and was "subject, in this case, to the immunities available to the state itself." *Id.*

Unlike the school board considered by this Court in *Mt. Healthy*, New Mexico school boards are subject to comprehensive control by the state. The state constitution provides that public schools "shall forever remain under the exclusive control of the state," and shall be subject to the "control, management and direction" of the state board of education. N.M. Const. art. XII, §§ 3 and 6. The control exercised by the state board pursuant to the constitution and its implementing statutes is pervasive, and is far more significant than the guidance provided by Ohio to the local board defendant in *Mt. Healthy*.

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[13] Existing New Mexico law distinguishes between "municipalities" which include any incorporated city, town, or village, as well as certain counties, and "political subdivisions," such as school districts, which are not granted the independence afforded to municipal corporations. *Compare, e.g.*, N.M. Const. art. IX, § 12 *with* N.M. Const. art. IX, § 11.

See N.M. Stat. Ann. §§ 22-1-1 to 22-2-16 (1978 & Supp. 1985); *Martinez v. Board of Education*, 748 F.2d at 1394; *see also Prince v. Board of Education*, 88 N.M. 548, 554, 543 P.2d 1176, 1182 (1975) (interpreting "control" in art. XII, § 3, "to mean control over the curriculum, disciplinary control, financial control, administrative control and, in general, control over all of the affairs of the school").

Under New Mexico law, the state prescribes courses of instruction; determines qualifications for teachers and administrators; sets graduation requirements; prescribes reporting forms; approves or invalidates all regulations promulgated by any entity concerning any public school activity; approves or invalidates any decision of any entity concerning any public school activity; assesses, evaluates, and accredits public schools and their operations; and manages and operates any public school or school district which fails to meet state board standards, state board regulations, or other requirements of law. N.M. Stat. Ann. § 22-2-2 (Supp. 1985). Additionally, the state prescribes standards for curriculum, organization, administration, and record keeping, teacher preparation, the physical condition of schools and grounds, and educational facilities. N.M. Stat. Ann. § 22-2-8 (1978). Local school boards in New Mexico must accede to the state's control in each of these areas.

The control exercised by the state extends beyond operations to virtually every budgetary and fiscal matter relating to the board. N.M. Stat. Ann. §§ 22-8-1 to -42 (1978 & Supp. 1985). Administration of school district funds is accomplished through the office of education of the New Mexico department of finance and administration,

which is required to "control the preparation of, all budgets of all public schools and school districts . . . ." N.M. Stat. Ann. §§ 22-8-3 and -4(A) (1978 & Supp. 1985). Budgets must be approved by the state, N.M. Stat. Ann. §§ 22-8-5, -10 and -11 (1978), and any transfer from one budget item to another, as well as any significant budget increase, must be approved by the director of the state office of education after a public hearing, N.M. Stat. Ann. § 22-8-12 (1978). Approval by the state is required before a school board can issue certificates of indebtedness, N.M. Stat. Ann. § 22-8-35 (1978); hold its own funds, N.M. Stat. Ann. § 22-8-37 (1978); issue general obligation or revenue bonds, N.M. Stat. Ann. §§ 22-18-9, 22-19-6 and -7 (1978);[14] undertake construction or remodelling, N.M. Stat. Ann. §§ 22-20-1 to -3 (1978); or dispose of school property, N.M. Stat. Ann. § 13-6-2 (1978).

Petitioner implies that the Tenth Circuit's decisions holding that New Mexico school boards are entitled to eleventh amendment immunity are based solely on an allegedly erroneous factual finding that a state source would fund payment of any civil rights judgment entered against a school board.[15] Pet. at 26, 31. As shown above, how-

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[14] Uses to which income from revenue bond "income projects" may be put are limited by statute to retiring the debt on the project or paying the operating costs. N.M. Stat. Ann. § 22-19-8 (1978); *see also* N.M. Const. art. IX, § 11.

[15] In *Martinez*, the Tenth Circuit did note a stipulation that any judgment would be paid by state funds. 748 F.2d at 1394. This did not, however, determine the issue of the nature of the school board as an arm of the state. After noting the stipulation, the *Martinez* court conducted an extended analysis of the relationship between school boards

(Continued on following page)

ever, the Tenth Circuit's analysis is quite different from that implied by Petitioner.[16] *See also Epperson.* Moreover, the facts and relevant statutory and constitutional provisions indicate that a judgment against a school board would indeed be paid from state funds.[17]

(Continued from previous page)

and the state board of education in reaching its conclusion that New Mexico school boards are arms of the state. Judge Burciaga, in *Naranjo v. Espanola School Board of Education,* reached the same conclusion after an extended analysis of the New Mexico statutory and constitutional scheme relating to the structure of local school boards. In that case, no stipulation regarding the source of payment was made.

16 The Tenth Circuit set out its test for distinguishing "alter egos" from purely local entities for eleventh amendment purposes in *Unified School District No. 480 v. Epperson.* The court there held that if "it is agreed that if the money judgment sought to be entered against a board or agency will be satisfied out of the state treasury, then the board is immune from suit under the Eleventh Amendment." 551 F.2d at 259 (citing *Edelman v. Jordan). See also Pennhurst,* 465 U.S. at 123 n.34. However, the court in *Epperson* further held that if it is unclear whether state funds would be used to pay such a judgment, the court must then consider other factors, such as the degree of autonomy granted by the state to the board or agency, to determine the availability of the immunity defense. 551 F.2d at 259.

17 School district funds in New Mexico are in essence state funds. In 1982-83, 96% of all school district funds were provided by the state. *Martinez,* 748 F.2d at 1395. This money is appropriated by the state legislature, and its expenditure is regulated by the state. The New Mexico Tort Claims Act, N.M. Stat. Ann. §§ 41-4-20 to -28 (1978 & Supp. 1985), requires school districts to cover the risks of an adverse civil judgment either by purchasing private insurance, establishing reserves, or by purchasing a participation interest in the New Mexico public liability fund. State resources must be used by a district to meet its obligations under this act. A school district has no independent means of raising funds to satisfy a money judgment.

Petitioner claims that article VIII, § 7 of the New Mexico Constitution insures that a judgment against a school board would not be paid out of state funds. Petitioner's reliance on this provision, however, is misplaced. Even if section 7 validly prohibits execution on a judgment against a school board, it does not prohibit *payment* of the judgment, the critical issue presented here. Petitioner's reading of section 7 would render a school board powerless to pay a judgment entered against it.[18] The provision of that section allowing for a tax levy in lieu of execution is not self-executing, and since the New Mexico Legislature has failed to enact any authorization for a school board to impose a tax levy to pay a civil rights judgment, *Martinez*, 748 F.2d at 1395, the school board has no power to do so.[19] *See McAtee v. Gutierrez*, 48 N.M. 100, 146 P.2d 315 (1944).

There is also no basis for Petitioner's contention that the law in the Tenth Circuit on the issue of school board immunity vacillates or demonstrates an impermissible inconsistency. See Pet. at 34-35. This Court's decision in *Mt. Healthy* contemplates a state-by-state determination

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[18] To the extent Petitioner wishes to relinquish any right to payment of the judgment received in the district court by adopting the position that he cannot execute on it, this case presents no case or controversy deserving of review by this Court.

[19] Even if a tax levy could otherwise be imposed for such a judgment, however, a tax levy could not be imposed here. Because each school district is required to budget sufficient revenue to cover the risk of any civil rights judgment, N.M. Stat. Ann. § 41-4-20 (1978), and to pay such judgment pursuant to the provisions of the Tort Claims Act, N.M. Stat. Ann. §§ 41-4-1 to -29 (1978 & Supp. 1985), a tax levy would not be "necessary" as required by statute. N.M. Stat. Ann. § 37-7-7 (1978).

of the nature of school boards in the context of eleventh amendment immunity. The availability of that immunity will necessarily depend on each particular state's statutory and constitutional scheme. *See, e.g., Hall v. Medical College of Ohio at Toledo,* 742 F.2d 299 (6th Cir. 1984), *cert. denied,* 105 S. Ct. 796 (1985); *United Carolina Bank v. Board of Regents of Stephen F. Austin State University,* 665 F.2d 553 (5th Cir. 1982); *Carey v. Quern,* 588 F.2d 230 (7th Cir. 1978); *Jagnandan v. Giles,* 538 F.2d 1166 (5th Cir. 1976), *cert. denied,* 432 U.S. 910 (1977).

The Tenth Circuit, thus, has concluded that school boards or districts in Kansas, Wyoming, and Oklahoma are not entitled to eleventh amendment immunity, due to the primarily local nature of these entities under applicable law. *United School District No. 480 v. Epperson; Bertot v. School District No. 1,* 613 F.2d 245 (10th Cir. 1979); *McGhee v. Draper,* 639 F.2d 639 (10th Cir. 1981). New Mexico and Utah school boards, which operate within different constitutional and statutory frameworks, however, are entitled to eleventh amendment immunity. *Martinez; Harris v. Tooele County School District,* 471 F.2d 218 (10th Cir. 1973). These decisions are not inconsistent; rather, they represent the considered application of this Court's articulated standards to state entities of fundamentally differing natures.

This result of the application of the *Mt. Healthy* analysis is precisely what is expected and desired under our system of federalism. This Court has recognized federalism as "a system in which there is sensitivity to the legitimate interests of both State and National Governments." *Younger v. Harris,* 401 U.S. 37, 44 (1971). Where, as in

New Mexico, the state establishes and maintains school boards as essentially non-autonomous entities under the direct supervision and control of state agencies, the boards are entitled to immunity because an action against a board is in reality an action against the state. Where, on the other hand, the court finds that school boards or districts are primarily autonomous and subject only to general supervision, the boards are not entitled to immunity because they are not truly alter egos of the state. *See Unified School District No. 480 v. Epperson.* Petitioner, in his claim that "the logical extension of the Tenth Circuit's ruling would be an emasculation of *Monell* and *Mt. Healthy,*" Pet. at 26, fails to recognize that the decision of the court below does nothing more than give effect to the distinction recognized by this Court between independent autonomous local bodies, which are not entitled to eleventh amendment immunity, and those entities which are truly arms of the state in view of the degree of control and supervision exercised over them by the state. *See Quern v. Jordan,* 440 U.S. 332, 338 (1979); *Monell,* 436 U.S. at 690 n.54.

Because the availability of eleventh amendment immunity to local school boards is dependent upon the particular statutory and constitutional framework of each state, the question raised by the decision below is a question unique to New Mexico. The court of appeals decision is consistent with other decisions of the Tenth Circuit and with decisions of this Court. This case therefore presents no issue appropriate for review by certiorari.

———o———

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DIANE FISHER
MICHAEL J. CONDON
JO SAXTON BRAYER
BRUCE HALL, Counsel of Record

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900

Counsel for Respondents

June 26, 1986

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil 80-0399 HB

J. PLACIDO GARCIA,

Plaintiff,

vs.

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, LEO LUJAN, MARGENE HARRIS, DANIEL TRUJILLO and DAVID SHORTESS, Individually and as Members of the Socorro Consolidated School District,

Defendants and
Counterclaimants.

TRANSCRIPT OF PROCEEDINGS

VOLUME II OF IV

BE IT REMEMBERED that on the 6th day of November, 1981, at 9:04 o'clock a.m., this matter came on for trial before the HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting in open court at Albuerque, New Mexico.

APPEARANCES

FOR THE PLAINTIFF:

CHARLES S. SOLOMON, ESQ.
RONALD VANAMBERG, ESQ.
Attorneys at Law
Santa Fe, New Mexico 87501

FOR THE DEFENDANTS:

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Attorneys at Law
20 First Plaza, Suite 700
Albuquerque, New Mexico 87103
BY: JO SAXON BRAYER, ESQ.
KENNETH J. FERGUSON, ESQ.

FOR THE COUNTERCLAIMANTS:

BIVINS, WEINBRENNER, RICHARDS & PAULOWSKY, P.A.
Attorneys at Law
P. O. Drawer O
Las Cruces, New Mexico 88804
BY: LESLIE SMITH, ESQ.

J. DOUGLAS COMPTON, ESQ.
Attorney at Law
Las Cruces, New Mexico 88804

* * * * *

(p. 171) THE COURT: Well, I—I'll think about that. I wouldn't continue too strongly on that. I've got a clear liability issue. And other than that, I'll look at them.

Now, let me ask you for my benefit: You don't have anything about punitive damages in your jury requests. Do you—is that a mistake or what?

MR. VANAMBERG: I thought I did prepare four sets of four different punitive damage verdict forms. If I didn't, it was because it was inadvertently left out.

(p. 172) THE COURT: Let me ask you in that regard: You're entitled to put your case to a jury, how you want to. I just tell you, you're going to get it terribly confused and complicated if you go against the defendants

individually, against the defendants in their official capacities.

Individually, good faith is a defense, but you can recover punitive damages in their official capacites. Good faith is not a defense, but you can't recover punitive damages.

I'll do my best to explain it to a jury. I guarantee I'm not able to, and I don't think any of you are, whether they'll get it. But if you want to put in these various combinations, why, we'll do it.

MR. VANAMBERG: I will discuss whether or not we would withdraw punitive damages.

THE COURT: If you're not gung ho on your punitive damages, obviously your clearest shot is in official capacity. There's no question if impropriety here and that takes out any good faith issue out of your lawsuit. Takes out punitives. But that's up to you, if you want to do it, just say the law—the law has gotten so horribly confused in this area, that I don't know what these appellate court think they're doing.

No jury can grasp it. Might be one thing if (p. 173) you're trying a case in equity, but they have got it beyond the reach and realm of most any jury I've dealt with.

Think it over over the weekend and let me know or let my law clerk know first thing and let Mr. Ferguson know first thing Monday morning what you want to pursue and what you want to press.

I'll reserve on your various motions, Mr. Ferguson. They're matters of jury instructions as I have indicated

in my view. In that regard, I think you might also want to consider about getting your—well, I don't know.

I have told you I don't think you have laid a glove on anybody on the free speech issue except possibly Mr. Lujan. I'm not sure you've gotten one there, even.

I'll think about it over the weekend. Okay. Let's get the jury in and we'll go for a while and then we'll knock it off kind of early today and I'll pick up the pace Monday. I'm sure we can get this thing done possibly Tuesday. Okay.

* * * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil 80-0399 HB

J. PLACIDO GARCIA,

Plaintiff,

vs.

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, LEO LUJAN, MARGENE HARRIS, DANIEL TRUJILLO and DAVID SHORTESS, Individually and as Members of the Socorro Consolidated School District,

Defendants and
Counterclaimants.

TRANSCRIPT OF PROCEEDINGS

VOLUME III OF IV

BE IT REMEMBERED that on the 9th day of November, 1981, at 9:30 o'clock a.m., this matter came on for Jury Trial before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting in open court at Albuquerque, New Mexico.

* * * * *

(p. 4) (Whereupon, the following proceedings were held out of the presence of the Jury.)

THE COURT: Mr. Van Amberg, I asked the other day, working on your instructions, and I wanted to know whether you were in a position to advise me whether you want to pursue your claims against the Defendants in both

their individual official capacities. Have you made any firm conclusion on that?

MR. VAN AMBERG: We did. I did consult with my client and with Mr. Solomon and we agreed to drop the punitive damages.

THE COURT: Then, in effect, you want to pursue them just in their official capacities?

MR. VAN AMBERG: I suppose that would be correct, yes, Your Honor.

THE COURT: Any problem with that, Mr. Ferguson?

MR. FERGUSON: No, Your Honor. Not with me.

THE COURT: I assume your injury door is closed; I was going to say I assume your insurance company has no objection to that?

MR. FERGUSON: I don't think so, Your Honor; if you call it my insurance.

THE COURT: All right. Then we will draft the instructions in that they pursue the Defendants in their official capacities, in effect, as amounts to a suit (p. 5) against the school district and that eliminates the good faith defense and the elimination of punitive damages.

MR. VAN AMBERG: May it please the Court, I should restate that. We would still desire to prove and proceed on the damage issue.

THE COURT: Oh, yes.

MR. VAN AMBERG: Okay.

THE COURT: Compensatory damages.

MR. VAN AMBERG: Compensatory.

THE COURT: But punitives would be out?

MR. VAN AMBERG: Right. And there would be no good faith defense.

THE COURT: And there would be no good faith defense; is that right, Mr. Ferguson?

MR. FERGUSON: That's as I understand it, Your Honor, yes, against the school members in their official capacities, good faith is not a defense.

THE COURT: All right. We'll draft the instructions accordingly then. Okay. Marshal, will you bring the Jury in, please.

* * * * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil 80-0399 HB

J. PLACIDO GARCIA,

Plaintiff,

vs.

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, LEO LUJAN, MARGENE HARRIS, DANIEL TRUJILLO and DAVID SHORTESS, Individually and as Members of the Socorro Consolidated School District,

Defendants and
Counterclaimants.

TRANSCRIPT OF PROCEEDINGS
VOLUME IV OF IV

BE IT REMEMBERED that on the 10th day of November, 1981, at 9:00 o'clock a.m., this matter came on for Jury Trial before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting in open court at Albuquerque, New Mexico.

* * * * *

(p. 42) THE COURT: For the record, the Reporter is now here. I told you all awhile ago that I ruled out both the free speech and property claims of the Plaintiff. As a matter of law, I just don't think there's any evidence to go to the jury on those issues.

I also ruled that the Defendants are public officials or the counter-claimants are public officials on the *New York Times,* so the instructions are drafted accordingly.

Also, let's see; there was one other item I wanted to—Also, the instructions are drafted as against the Defendants strictly in their official capacities. I understood that's the way the Plaintiff wanted it. Therefore, that takes out any issue of punitive damages and also any issue of good faith. So if there's no hooker—There's no problem; if the Plaintiff is entitled to a verdict, it's recoverable. I assume that's true.

MR. FERGUSON: That's true, Your Honor.

(Laughter.)

THE COURT: I mean if the Plaintiff were recovering, then all at once the school district will not respond or claim some kind of immunity or something.

MR. FERGUSON: No. They probably would not have the money, but there's no problem with that.

MR. SOLOMON: Of course, if there's nothing (p. 43) with the County, the Constitution provides for that.

THE COURT: With that, what do you have for the Plaintiff on the instructions?

MR. VAN AMBERG: I think we previously tendered Plaintiff's Requested Instructions.

* * * * *

APPENDIX D

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

SF 86-1152(c)

J PLACICO GARCIA, CHARLES S SOLOMON, RONALD J VAN AMBERG, and ROTH, VAN AMBERG, GROSS, AMARANT and ROGERS, a New Mexico Partnership,

Plaintiffs,

vs

RODEY, DICKASON, SLOAN, ADKIN & ROBB, P.A. a New Mexico Professional Association, KENNETH J FERGUSON and JO SAXTON BRAYER,

Defendants.

JURY DEMANDED

FIRST AMENDED COMPLAINT TO RECOVER DAMAGES FOR TORTIOUS CONDUCT

Preliminary Statement:

1. This is an action for misrepresentation, constructive fraud, violations of the New Mexico Code of Professional Responsibility and Attorney's Oath, promissory estoppel, and breach of contract. The case arises out of certain representations and promises made by Defendants or their authorised agents to Chief Judge Bratton in *J. Placido Garcia vs Board of Education of the Socorro Consolidated School District*, et al, D.C. No. 80-399 HB and Plaintiffs.

PARTIES, JURISDICTION AND VENUE

2. Plaintiff Garcia is a resident of Socorro County, New Mexico.

3. The remaining individual Plaintiffs are residents of Santa Fe County, New Mexico. Roth, Van Amberg, Gross, Amarant & Rogers is a New Mexico Partnership with its principal place of business in Santa Fe County, New Mexico.

4. Upon information and belief, Defendant Rodey, Dickason, Sloan, Akin & Robb, P.A., (Rodey Firm) is organised under the laws of New Mexico as a Professional Association. Upon further information and belief, the agent for service of process is William A Sloan at 20 First Plaza, Suite 700, Albuquerque, NM. This Defendant has offices and operates not only in Albuquerque, NM but also in Santa Fe County, NM.

5. Upon information and belief, Defendant Ferguson is a licensed attorney in the State of New Mexico, was employed by Defendant Rodey, Dickason, Sloan, Akin & Robb, P.A., and is now a resident of Austin, Texas, and at all material times was acting within the scope of his employment with the Rodey Firm.

6. Upon information and belief, Defendant Brayer is a licensed attorney in the State of New Mexico, is employed by Defendant Rodey, Dickason, Sloan, Akin & Robb, P.A., and is now a resident of Bernalillo County, New Mexico, and at all material times was acting within the scope of her employment with the Rodey Firm.

7. All alleged material representations, promises, and sandbagging through words and conduct took place in the U.S. District Court for the District of New Mexico before the Honourable Chief Judge Howard Bratton in Albuquerque, NM.

FACTS

8. In the § 1983 federal case and at the close of the evidence, the Honourable Chief Judge Howard Bratton suggested to Plaintiffs that it would greatly simplify matters to the jury if the defendants were dismissed in their individual capacities. Plaintiffs agreed, provided no immunity defence would be raised by the defendants. Chief Judge Bratton then asked Defendants Ferguson and Brayer whether any immunity defence would be raised if Plaintiffs dismissed the defendants in their individual capacity. Defendants Ferguson and Brayer represented to the federal court and Plaintiffs that it would not. Based upon Defendants representation, statement and promise, Plaintiffs dismissed defendants in their individual capacities.

9. The record between the Court and counsel reads:

> THE COURT: [T]he instructions are drafted as against the Defendants strictly in their official capacities. I understood that's the way the Plaintiff wanted it. Therefore that takes out any issue of punitive damages and also any issue of good faith. So if there's no hooker—There's no problem; if the Plaintiff is entitled to a verdict, its recoverable. I assume that's true.
>
> DEFENCE COUNSEL: That's true, Your Honor.
>
> . . .
>
> THE COURT: I mean if the Plaintiff were recovering, then all at once the school district will not respond or claim some kind of immunity or something.
>
> DEFENCE COUNSEL: No. They probably would not have the money, but there's not problem with that.
>
> PLAINTIFF'S COUNSEL: Of course, if there's nothing with the County, the Constitution provides for that.

10. In the federal case on 12 November 1981, the jury returned a verdict of $180,000.00. The federal court awarded attorney fees under 42 U.S.C. § 1988 of $27,838.66, and post judgement interest at the rate of 10% per annum.

11. In the federal case, the defendants appealed. Well after the matter was fully briefed, Defendant Brayer wrote the Tenth Circuit Court of Appeals, raising Eleventh Amendment immunity. A copy of that letter is attached, incorporated herein, and marked as Plaintiff's Exhibit 1. This letter constitutes a reneging of the representation, statement and promise made to the federal court and Plaintiffs.

12. Based upon Defendant Brayer's letter which was sent with the approval of the remaining named Defendants, the Court of Appeals reversed the district court. The Court of Appeals called Defendants' tactic "sand bagging".

CLAIMS FOR RELIEF

13. The statements, representations and promises made by Defendants through words and conduct not to raise the Eleventh Amendment immunity were greatly relied upon by Plaintiffs and served as the basis for dismissing defendants in their individual capacities in the federal suit. Defendants negligently misrepresented their position to the federal trial court and Plaintiffs as described in this complaint. As a direct and proximate result of Defendants misrepresentation, Plaintiffs have lost the judgement, attorney fees and interest thereon as well as having incurred additional attorney fees in prosecution of the appeal and pending writ of certiorari before the U.S. Supreme Court.

14. Defendants' representations, statements and promises through words and conduct made to the federal trial court and Plaintiffs, the great reliance thereon, and the subsequent reneging of them constituted a violation of the New Mexico Code of Professional Responsibility, particularly, DR 1-102(A), 7-102(A), 7-106(C) and 9-101, and the Attorney's Oath, which was administered to Defendants Ferguson and Brayer as a condition for their membership in the New Mexico Bar. The Code of Professional Responsibility and the Attorney's Oath are for the protection of the public and in particular for the protection of persons of a class to which Plaintiffs belong and violations of any provision of them give Plaintiffs a right to a cause of action. As a direct and proximate result of Defendants violations of the Code of Professional Responsibility and the Attorney's Oath, Plaintiffs have lost the judgement, attorney fees and interest thereon as well as having incurred additional attorney fees in prosecution of the appeal and pending writ of certiorari before the U.S. Supreme Court.

15. Defendants' actions, representations, statements and promises made to the federal trial court and Plaintiffs, the great reliance thereon, and the subsequent reneging of them violated public policy, sound morals and of the provisions of the Code of Professional Responsibility and the Attorney's Oath (as described in ¶14) and constituted constructive fraud. As a direct and proximate result of Defendants' constructive fraud, Plaintiffs have lost the judgement, attorney fees and interest thereon as well as having incurred additional attorney fees in prosecution of the appeal and pending writ of certiorari before the U.S. Supreme Court.

16. Defendants' representations, statements and promises through words and conduct made to the federal trial court and Plaintiffs, the great reliance thereon, and the subsequent reneging of them constituted a cause of action under the doctrine of promissory estoppel. As a direct and proximate cause of Defendants' actions as set forth in this complaint, Plaintiffs have lost the judgement, attorney fees and interest thereon as well as having incurred additional attorney fees in prosecution of the appeal and pending writ of certiorari before the U.S. Supreme Court.

17. Defendants' representations, statements and promises through words and conduct made to the federal trial court and Plaintiffs, the great reliance thereon, and the subsequent reneging of them constituted a breach of contract between Defendants and Plaintiffs. As a direct and proximate result of this breach of contract, Plaintiffs have lost their judgement, attorney fees and interest thereon as well as having incurred additional attorney fees in pursuing an appeal to the Tenth Circuit Court of Appeals and a writ of certiorari to the U.S. Supreme Court.

WHEREFORE, Plaintiffs seek the following relief:

1. Compensatory damages from Defendants, jointly or severally, for $600.000.00.

2. Costs of this action.

3. Prejudgement interest.

4. Attorney fees as provided by law.

5. Any further relief the Court deems just and equitable.

Respectfully submitted

MICHAEL SCHWARZ
Counsel for Plaintiffs
P O Box 713
Santa Fe, NM 87504
988-2053

JURY DEMAND

Pursuant to Rule 38 of the New Mexico Rules of Civil Procedure, Plaintiff requests that this matter be tried before a jury of six.

MICHAEL SCHWARZ

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States

U.S. Const. Amend.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New Mexico Constitutional Provisions

Art. VIII Sec. 7. [Judgments against local officials.]

> No execution shall issue upon judgment rendered against the board of county commissioners of any county, or against any incorpo-

rated city, town or village, school district or board of education; or against any officer of any county, incorporated city, town or village, school district or board of education, upon any judgment recovered against him in his official capacity and for which the county, incorporated city, town or village, school district or board of education, is liable, but the same shall be paid out of the proceeds of a tax levy as other liabilities of counties, incorporated cities, towns or villages, school districts or boards of education, and when so collected shall be paid by the county treasurer to the judgment creditor. (As amended November 3, 1914.)

Art. XI Sec. 9. [School district indebtedness; restrictions.]

No school district shall borrow money except for the purpose of erecting, remodeling, making additions to and furnishing school buildings or purchasing or improving school grounds or any combination of these purposes, and in such cases only when the proposition to create the debt has been submitted to a vote of such qualified electors of the district as are owners of real estate within the school district and a majority of those voting on the question have voted in favor of creating such debt. No school district shall ever become indebted in an amount exceeding six percent on the assessed valuation of the taxable property within the school district as shown by the pre-

ceding general assessment. (As amended September 19, 1933, and September 28, 1965.)

Art. XII Section 1. [Free public schools.]

A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.

Art. XII Sec. 2. [Permanent school fund.]

The permanent school fund of the state shall consist of the proceeds of sales of Sections Two, Sixteen, Thirty-Two and Thirty-Six in each township of the state, or the lands selected in lieu thereof; the proceeds of sales of all lands that have been or may hereafter be granted to the state not otherwise appropriated by the terms and conditions of the grant; such portion of the proceeds of sales of land of the United States within the state as has been or may be granted by congress; also all other grants, gifts and devises made to the state, the purpose of which is not otherwise specified.

Art. XII Sec. 3. [Control of constitutional educational institutions; use of state land proceeds and other educational funds.]

The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part

of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

Art. XII Sec. 4. [Current school fund.]

All fines and forfeitures collected under general laws; the net proceeds of property that may come to the state by escheat; the rentals of all school lands and other lands granted to the state, the disposition of which is not otherwise provided for by the terms of the grant or by act of congress; and the income derived from the permanent school fund, shall constitute the current school fund of the state. (As amended November 2, 1971.)

Art. XII Sec. 6. [State department of public education; state board of education.]

A. There is hereby created a "state department of public education" and a "state board of education." The state board of education shall determine public school policy and vocational educational policy and shall have control, management and direction of all public schools, pursuant to authority and powers provided by law. The board shall appoint a qualified, experienced educational administrator to be known as the superintendent of public instruction, who shall,

subject to the policies established by the board, direct the operation of the state department of public education.

B. The members of the state board of education shall be elected at the general election next following the adoption of this amendment. One member shall be elected from each of the present ten judicial districts. The initial board shall determine by lot from its membership three members to serve terms of two years and three members to serve terms of four years. The remaining of the initial board shall serve terms of six years. Thereafter, as the terms of the initial board members expire, their replacements shall be elected from the same districts for terms of six years.

If additional judicial districts are created the legislature may provide by law for the election by the people of a board of not less than seven members nor more than ten members from board of education districts, created by the legislature.

The governor shall fill vacancies in the board by appointment of a resident from the district in which the vacancy occurs. Appointments shall be made within sixty days after the vacancy occurs. The appointed member shall serve until the next general election, at which time a member shall be elected to complete the original unexpired term.

C. Board members shall be residents of the district they represent. Change of residence of a board member to a place outside the district from which he was elected shall automatically terminate the term of that member. The board members may be removed in the manner in which the legislature may provide by law. (As amended November 4, 1958, effective January 1, 1959.)

Art. XII Sec. 7. [Investment of permanent school fund.]

The principal of the permanent school fund, and other permanent funds, shall be invested by a state investment officer in accordance with policy regulations promulgated by a state investment council. The legislature may by a three-fourths vote of the members elected to each house provide that said funds may be invested in interest-bearing or other securities. All losses from such interest-bearing notes or securities which have definite maturity dates shall be reimbursed by the state.

The state investment officer, in order to realize increased income, may, with the approval of the state investment council, sell interest-bearing notes or securities at less than their original acquisition cost, providing the proceeds are immediately reinvested in sufficiently higher yielding interest-bearing notes or securities, to provide for a portion of the

increased interest income to be amortized over the life of the new investment which will restore to the corpus of the fund the amount of the capital loss realized on the sale of the original investment.

In making investments, the state investment officer, under the supervision of the state investment council, shall exercise the judgment and care under the circumstances then prevailing which businessmen of ordinary prudence, discretion and intelligence exercise in the management of their own affairs not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital; provided, not more than fifty percent of the permanent school fund or other permanent fund, shall be invested at any given time in corporate stocks and bonds nor shall more than ten percent of the voting stock of a corporation be held; and provided further, stocks eligible for purchase shall be restricted to those stocks of businesses incorporated within the United States which have paid dividends for ten consecutive years or longer immediately prior to the date of purchase and which are listed upon a national stock exchange. (As amended November 4, 1958 and September 28, 1965.)

New Mexico Statutory Provisions

22-1-2. Definitions.

As used in the Public School Code:

A. "state board" means the state board of education;

B. "state superintendent" means the superintendent of public instruction;

C. "department of education" means the state department of public education;

D. "certified school instructor" means any person holding a valid certificate authorizing the person to teach, supervise an instructional program, counsel or provide special instructional services in the public schools of the state;

E. "certified school administrator" means any person holding a valid certificate authorizing the person to administer in the public schools of the state;

F. "certified school personnel" means certified school instructors and certified school administrators;

G. "certificate" means a certificate issued by the state board authorizing a person to teach, supervise an instructional program, counsel, provide special instructional services or administer in the public schools of the state;

H. "chief" or "director" means the director of the office of education unless the context clearly indicates otherwise;

I. "private school" means a school offering programs of instruction not under the control, supervision or management of a local school board exclusive of home instruction offered by the parent, guardian or one having custody of the student;

J. "school district" means an area of land established as a political subdivision of the state for the administration of public schools and segregated geographically for taxation and bonding purposes;

K. "local school board" means the governing body of a school district;

L. "public school" means that part of a school district which is a single attendance center where instruction is offered by a certified school instructor or a group of certified school instructors and is discernible as a building or group of buildings generally recognized as either an elementary, secondary, junior high or high school, or any combination thereof;

M. "school year" means the total number of teaching days offered by public schools in a school district during a period of twelve consecutive months;

N. "consolidation" means the combination of part or all of the geographical area of an existing school district with part or all of the geographical area of one or more contiguous existing school districts;

O. "consolidated school district" means a school district created by order of the state board by combining part or all of the geographical area of an existing school district with part or all of the geographical area of one or more contiguous existing school districts;

P. "state institution" means the New Mexico military institute, the New Mexico school for the visually handicapped, the New Mexico school for the deaf, the New Mexico boys' school. the New Mexico youth diagnostic center, the Los Lunas medical center, the Fort Stanton hospital, the Las Vegas medical center or the Carrie Tingley crippled children's hospital;

Q. "state educational institution" means an institution enumerated in Article 12, Section 11 of the constitution of New Mexico;

R. "forty-day report" means the report of qualified regular and handicapped student membership of each school district and of those eligible to be qualified students but enrolled in a private school or a home school for the first forty days of school;

S. "school" means any supervised program of instruction designed to educate a person in a particular place, manner and subject area;

T. "school-age person" means any person who is at least five years of age prior to 12:01 a.m. on September 1 of the school year and who has not received a high school diploma or its equivalent. A maximum age of twenty-one shall be used for persons who are classified as special education average daily membership as defined in Section 22-8-2 NMSA 1978 or as residents of state institutions; and

U. "home school" means the operation by a parent, guardian or other person having custody of a school-age person of a home study program which provides a basic academic educational program including but not limited to

reading, language arts, mathematics, social studies and science.

22-2-1. State board; powers.

A. The state board is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law.

B. The state board may promulgate, publish and enforce regulations to exercise its authority granted pursuant to the Public School Code.

C. The state board may apply to the district court for an injunction, writ of mandamus or other appropriate relief to enforce the provisions of the Public School Code or any of its regulations promulgated pursuant thereto.

22-2-2. State board; duties.

Without limiting those powers granted to the state board pursuant to Section 22-2-1 NMSA 1978, the state board shall perform the following duties:

A. properly and uniformly enforce the provisions of the Public School Code;

B. determine policy for the operation of all public schools and vocational education programs in the state;

C. appoint a state superintendent;

D. purchase and loan instructional material to students pursuant to the Instructional Material Law [22-15-1 to 22-15-14 NMSA 1978];

E. designate courses of instruction to be taught in all public schools in the state;

F. assess and evaluate those private schools which desire state accreditation;

G. determine the qualifications for and issue a certificate to any person teaching, assisting teachers, supervising an instructional program, counseling, providing special instructional services or administering in public schools according to law and according to a system of classification adopted and published by the state board;

H. suspend or revoke a certificate held by a certified school instructor or certified school administrator according to law for incompetency, immorality or for any other good and just cause;

I. make full and complete reports on consolidation of school districts to the legislature;

J. prescribe courses of instruction, requirements for graduation and standards for all public schools, for private schools seeking state accreditation and for the educational programs conducted in state institutions under the authority of the secretary of health and environment;

K. adopt regulations for the administration of all public schools and bylaws for its own administration;

L. require periodic reports on forms prescribed by it from all public schools and attendance reports from private schools;

M. authorize adult educational programs to be conducted in schools under its jurisdiction and promulgate and publish regulations governing all such adult educational programs;

N. require all accrediting agencies for public schools in the state to act with its approval;

O. accept and receive all grants of money from the federal government or any other agency for public school purposes and disburse the money in the manner and for the purpose specified in the grant;

P. require prior approval for any educational program in a public school which is to be conducted, sponsored, carried on or caused to be carried on by a private organization or agency;

Q. approve all rules or regulations promulgated by any association or organization attempting to regulate any public school activity and invalidate any rule or regulation in conflict with any regulation promulgated by the state board. The state board shall have no power or control over the rules or regulations or the bylaws governing the administration of the internal organization of the association or organization;

R. review decisions made by the governing board or officials of any organization or association regulating any public school activity, and any decision of the state board shall be final in respect thereto;

S. accept or reject any charitable gift, grant, devise or bequest. The particular gift, grant, devise or bequest accepted shall be considered an asset of the state;

T. establish and maintain regional centers, at its discretion, for conducting cooperative services between public schools and school districts within and among those regions and to facilitate regulation and evaluation of school programs;

U. assess and evaluate for accreditation purposes at least one-third of all public schools each year through visits

by department of education personnel to investigate the adequacy of pupil gain in standard required subject matter, adequacy of pupil activities, functional feasibility of public school and school district organization, adequacy of staff preparation and other matters bearing upon the education of the students;

V. provide for management and other necessary personnel to operate any public school or school district which has failed to meet requirements of law, state board standards or state board regulations; provided that the operation of the public school or school district shall not include any consolidation or reorganization without the approval of the local board of that school district. Until such time as requirements of law, standards or regulations have been met and compliance is assured, the powers and duties of the local school board shall be suspended;

W. establish and implement a plan that provides for technical assistance to local school boards through workshops and other inservice training methods; provided, however, that no plan shall require mandatory attendance by any member of a local school board;

X. submit a plan applying for funds available under Public Law 94-142 and disburse these funds in the manner and for the purposes specified in the plan; and

Y. enforce requirements for home schools. Upon finding that a home school is not in compliance with law, the state board shall have authority to order that a student attend a public school or a private school.

22-2-8. Educational standards.

The state board shall prescribe minimum educational standards for all public schools in the state. A copy of these educational standards shall be furnished by the department of education to each local school board. The educational standards shall include minimum standards for the following areas:

A. curriculum;

B. organization and administration of education;

C. the keeping of records, other than financial records prescribed by the chief;

D. membership accounting;

E. teacher preparation;

F. the physical condition of public school buildings and grounds; and

G. educational facilities of public schools including laboratories and libraries.

22-2-14. Education requirements; enforcement; procedures.

A. Money budgeted by a school district shall be spent first to attain and maintain the requirements for a school district as prescribed by law and standards and regulations as prescribed by the state board. The state superintendent shall give written notification to a local school board of any failure to meet requirements by any part of the school district under control of the local school board. The notice shall specify the deficiency. Instructional units or administrative functions may be disapproved for such de-

ficiencies. The state superintendent shall disapprove instructional units or administrative functions which he determines to be detrimental to the educational process.

B. Within thirty days after receipt of the notice of failure to meet requirements, the local school board shall:

(1) comply with the specific and attendant requirements in order to remove the cause for disapproval; or

(2) submit plans satisfactory to the state superintendent to meet requirements and remove the cause for disapproval.

C. A copy of all disapproval notices shall be sent to the director.

D. The state board shall suspend from authority and responsibility any local school board which has had notice of disapproval and fails to comply with procedures of Subsection B of this section. The state superintendent and director shall act in lieu of the suspended local school board until the state board removes the suspension.

E. To suspend a local school board, the state board shall deliver to the local school board an alternative order of suspension, stating the cause for the suspension and effective date and time the suspension will begin. The alternative order shall also contain notice of a time, date and place for a public hearing, prior to beginning of suspension, to be held by the state board, at which the local school board may appear and show cause why it should not be suspended. Within five days after the hearing, the state board shall make permanent, modify or withdraw the alternative order.

F. The state superintendent may suspend a local school board pending a hearing before the state board when the local school board has been notified of disapproval and when the state superintendent has sufficient reason to believe that the educational process in the district has been severely impaired or halted as a result of deficiencies so severe as to warrant disapproved status before the question of suspension can be presented to the state board for a hearing.

G. The state superintendent and director, while acting in lieu of a suspended local school board, shall execute all of the legal authority of the local board of education and assume all of the responsibilities of such board.

H. The provisions of this section shall be invoked at any time the state superintendent finds the school district has failed to attain and maintain the requirements of law or state board standards and regulations.

22-5-4. Local school boards; powers; duties.

A local school board shall have the following powers or duties:

A. subject to the regulations of the state board, supervise and control all public schools within the school district and all property belonging to or in the possession of the school district;

B. employ a superintendent of schools for the school district and fix his salary;

C. delegate administrative and supervisory functions of the local school board to the superintendent of schools;

D. subject to the provisions of law, approve or disapprove the employment, termination or discharge of all employees and certified school personnel of the school district upon a recommendation of employment, termination or discharge by the superintendent of schools. Any employment, termination or discharge without the prior recommendation of the superintendent is void;

E. fix the salaries of all employees and certified school personnel of the school district;

F. contract, lease, purchase and sell for the school district;

G. acquire and dispose of property;

H. have capacity to sue and be sued;

I. acquire property by eminent domain as pursuant to the procedures provided in the Eminent Domain Code [42A-1-1 to 42A-1-33 NMSA 1978];

J. issue general obligation bonds of the school district;

K. repair and maintain all property belonging to the school district;

L. for good cause and upon order of the district court, subpoena witnesses and documents in connection with a hearing concerning any powers or duties of the local school boards;

M. except for expenditures for salaries, contract for the expenditure of money according to the provisions of the Public Purchases Act [13-1-1 to 13-1-27 NMSA 1978];

N. adopt regulations pertaining to the administration of all powers or duties of the local school board;

O. accept or reject any charitable gift, grant, devise or bequest. The particular gift, grant, devise or bequest accepted shall be considered an asset of the school district or the public school to which it is given; and

P. to offer, and upon compliance with the conditions of such offer, to pay rewards for information leading to the arrest and conviction or other appropriate disciplinary disposition by the courts or juvenile authorities of offenders in case of theft, defacement or destruction of local school district property. All such rewards shall be paid from school district funds in accordance with regulations which shall be promulgated by the director of the public school finance division.

22-8-3. Office of education; creation; director.

A. The "office of education" is created within the department of finance and administration.

B. Subject to the authority of the secretary of finance and administration, the administrative and executive head of the office of education is the "director of the office of education." The director shall be appointed by the secretary of finance and administration with the governor's consent. Wherever in Chapter 22, Article 8 NMSA 1978 there appear the terms "chief," "chief of public school finance" or "director of public school finance" they shall be construed to mean the director of the office of education.

22-8-4. Public school finance division; duties.

In addition to other duties provided by law, the division shall:

A. prescribe the forms for, and supervise and control the preparation of, all budgets of all public schools and school districts;

B. compile accurate information concerning public school finance and administration; and

C. advise and consult with the state superintendent in regard to financial matters affecting public schools and school districts.

22-8-5. Manual of accounting and budgeting.

A. The division shall compile and publish a manual prescribing detailed regulations for a uniform system of accounting and budgeting of funds for all public schools and school districts of the state. The manual of regulations and any revision or amendments thereto shall become effective only upon approval by the legislative finance committee, filing with the supreme court law librarian and publication.

B. All public schools and school districts shall comply with the regulations prescribed in the manual of accounting and budgeting and shall, upon request, submit additional reports concerning finances to the division. In addition, upon request, all public schools and school districts shall file reports with the division containing pertinent details regarding applications for federal money or federal grants-in-aid, or regarding federal money or federal grants-in-aid received, including but not limited to

details of programs, matching funds, personnel requirements, salary provisions and program numbers as indicated in the catalog of federal domestic assistance, of the federal funds applied for and of those received.

22-8-6. Budgets; submission; failure to submit.

A. Prior to April 15 of each year, each local school board shall submit to the division an estimated budget for the school district for the ensuing fiscal year. Upon written approval of the chief [director of public school finance], the date for the submission of the estimated budget as required by this section may be extended to a later date fixed by the chief [director].

B. The estimated budget required by this section may include:

(1) estimates of the cost of insurance policies for periods up to five years if a lower rate may be obtained by purchasing insurance for the longer term; or

(2) estimates of the cost of contracts for the transportation of students for terms extending up to four years.

C. If a local school board fails to submit a budget pursuant to this section, the division shall prepare the estimated budget for the school district for the ensuing fiscal year. A local school board shall be considered as failing to submit a budget pursuant to this section if the budget submitted exceeds the total projected resources of the school district or if the budget submitted does not comply with the law or the manual of accounting and budgeting of the division.

22-8-7. Budgets; form.

All budgets submitted to the division by a school district shall be in a form specified by the manual of accounting and budgeting of the division.

22-8-8. Budgets; minimum student membership.

Without prior approval of the chief [director of public school finance], no local school board shall maintain or provide a budget allowance for a public school having an average daily membership of less than eight.

22-8-9. Budgets; minimum requirements.

A. No budget for a school district shall be approved by the division which does not provide for:

(1) a school year consisting of at least one hundred eighty teaching days; or

(2) a variable school year consisting of a minimum number of instructional hours established by the state board of education; and

(3) a pupil-teacher ratio no greater than that of the prior year or at least one full-time certified classroom teacher, or his equivalent, for each twenty-five students or major fraction thereof in membership in the school district.

B. The state board shall, by regulation, establish the requirements for a teaching day, the standards for an instructional hour and the standards for a full-time certified classroom teacher and for the equivalent thereof.

C. The local school board shall submit a plan for the implementation of an alternate school year to the state superintendent of public instruction for his approval.

D. The provisions of Subsection C and Paragraph (2) of Subsection A of this section shall be construed to apply only to school districts with an ADM of 500 or fewer.

22-8-10. Budgets; fixing the estimated budget.

Prior to June 20 of each year, each local school board and the chief [director of public school finance] shall, at a public hearing of which notice has been published by the local school board, fix the estimated budget for the school district for the ensuing fiscal year.

22-8-11. Budgets; temporary; final.

A. The division shall:

(1) on or before July 1 of each year, approve and certify to each local school board a temporary operating budget for use by the local school board pending approval by the division of a final budget;

(2) make corrections, revisions and amendments to the estimated budgets fixed by the local school board and the director to conform the budgets to the requirements of law and to the manual of accounting and budgeting of the division; and

(3) before the first Monday of September of each year, approve and certify to each local school board and to the board of county commissioners of the county in which the school district is situated, a final budget for use by the local school board based upon the estimated budget fixed by the local school board and the director.

B. No school board or officer or employee of a school district shall make any expenditure or incur any obligation

for the expenditure of public funds unless such expenditure or contractual obligation is made in accordance with an operating budget approved by the division but does not prohibit the transfer of funds between line items within series of a budget.

22-8-12. Final budgets; alterations or amendments.

Final budgets shall not be altered or amended after approval and certification by the division except for the following purposes and according to the following procedure:

A. upon written request of any local school board, the chief [director of public school finance] may authorize transfer within the budget or provide for items not included, when the total amount of the budget will not be increased thereby;

B. upon written request of any local school board, the chief [director], in conformance with the regulations of the department of finance and administration and with the approval of its secretary, may authorize an increase in any budget if the increase is necessary because of the receipt of revenue that was not anticipated at the time the budget was fixed and if the increase is directly related to a special project or program for which the additional revenue was received. The chief [director] shall make a written report to the legislative finance committee of any such budget increase;

C. upon written request of any local school board, the chief [director] may authorize an increase in a budget of not more than one thousand dollars ($1,000); or

D. upon written request of any local school board, the chief [director], after notice and a public hearing, may authorize an increase in a school budget in an amount exceeding one thousand dollars ($1,000). The notice of the hearing shall designate the school district which proposes to alter or amend its budget, together with the time, place and date of the hearing. The notice of the hearing shall be published at least once a week for two consecutive weeks in a newspaper of general circulation in the county in which the school district is situated. The last publication of the notice shall be at least three days prior to the date set for the hearing.

22-8-12.1. Budget requests.

A. Each local school board shall submit annually on or before October 15 to the division:

(1) an estimate for the succeeding fiscal year of:

(a) the average daily membership of qualified students to be enrolled in the basic program;

(b) the full-time-equivalent average daily membership of students to be enrolled in approved early childhood education programs; and

(c) the average daily membership of students to be enrolled in approved special education programs;

(2) all other information necessary to calculate program costs; and

(3) any other information related to the financial needs of the school districts as may be requested by the division.

B. The state board shall submit a budget request for the succeeding fiscal year for pupil transportation and textbooks to the secretary of finance and administration, annually, on or before October 15. The request shall include the formula or per-unit cost used to compute the budget request.

C. All information requested pursuant to Subsection A of this section shall be submitted on forms prescribed and furnished by the division and shall comply with the manual of accounting and budgeting published by the division.

D. The director of the public school finance division shall:

(1) review the financial needs of each school district for the succeeding fiscal year; and

(2) submit annually, on or before November 15, to the secretary of finance and administration the recommendations of the public school finance division for:

(a) amendments to the public school finance formula; and

(b) appropriations for the succeeding fiscal year to the public school fund for inclusion in the executive budget document.

22-8-14. Public school fund.

A. The "public school fund" is created.

B. This fund shall be distributed to school districts in the following parts:

(1) state equalization guarantee distribution;

(2) transportation distribution; and

(3) supplemental distributions:

(a) out-of-state tuition;

(b) emergency; and

(c) program enrichment.

C. The distributions of the public school fund shall be made by the chief [director of public school finance] within limits established by law. The balance remaining in the public school fund at the end of each fiscal year shall revert to the general fund unless otherwise provided by law.

22-8-15. Allocation limitation.

The chief [director of public school finance] shall determine the allocations to each school district from each of the distributions of the public school fund, subject to the limits established by law.

22-8-16. Payment to school districts.

The chief [director of public school finance] shall make payments of each distribution of the public school fund by warrant of the department of finance and administration drawn against the public school fund upon vouchers issued by the chief [director]. When payments are made to county treasurers for school districts within the county, the county treasurer shall hold and allocate these funds solely for the use and benefit of the specific school district and purpose for which the allocation was made.

22-8-25. State equalization guarantee distribution; definitions; determination of amount.

A. The state equalization guarantee distribution is that amount of money distributed to each school district to insure that the school district's operating revenue, including its local and federal revenues as defined in this section, is at least equal to the school district's program cost.

B. "Local revenue" as used in this section means ninety-five percent of receipts to the school district derived from that amount produced by a school district property tax applied at the rate of fifty cents ($.50) to each one thousand dollars ($1,000) of net taxable value of property allocated to the school district and to the assessed value of products severed and sold in the school district as determined under the Oil and Gas Ad Valorem Production Tax Act [Chapter 7, Article 32 NMSA 1978] and the Oil and Gas Production Equipment Ad Valorem Tax Act [Chapter 7, Article 34 NMSA 1978].

C. "Federal revenue" as used in this section means ninety-five percent of receipts to the school district excluding amounts which, if taken into account in the computation of the state equalization guarantee distribution, result, under federal law or regulations, in a reduction in or elimination of federal school funding otherwise receivable by the school district, derived from the following:

(1) the school district's share of forest reserve funds distributed in accordance with Section 22-8-33 NMSA 1978;

(2) grants from the federal government as assistance to those areas affected by federal activity author-

ized in accordance with Sections 236 through 240 of Title 20 of the United States Code (commonly known as "PL 874 funds") or an amount equal to the revenue the district was entitled to receive if no application was made for such funds; and

(3) grants from the federal government to public secondary schools authorized by the United States Vocational Education Act of 1963, as amended (20 U.S.C. 1241-1391).

D. To determine the amount of the state equalization guarantee distribution, the director of the office of education shall:

(1) calculate the number of program units to which each school district is entitled using the membership of the fortieth day of the school year for all programs except special education, which shall be calculated by using the membership on the fortieth or eightieth day of the school year, whichever is greater;

(2) using the results of the calculations in Paragraph (1) of this subsection and the instructional staff training and experience index from the October report of the prior school year, establish a total program cost of the school district;

(3) calculate the local and federal revenues as defined in this section; and

(4) deduct the sum of the calculations made in Paragraph (3) of this subsection from the program cost established in Paragraph (2) of this subsection.

E. The amount of the state equalization guarantee distribution to which a school district is entitled is the bal-

ance remaining after the deduction made in Paragraph (4) of Subsection D of this section.

F. The state equalization guarantee distribution shall be distributed prior to June 30 of each fiscal year. The calculation shall be based on the local and federal revenues specified in this section received from June 1 of the previous fiscal year through May 31 of the fiscal year for which the state equalization guarantee distribution is being computed. In the event that a district has received more state equalization guarantee funds than its entitlement, a refund shall be made by the district to the state general fund.

G. Notwithstanding the methods of calculating the state equalization guarantee distribution in this section and Laws 1974, Chapter 8, Section 22, if a school district receives funds under Section 2391 of Title 42 U.S.C.A. and if the federal government takes into consideration grants authorized by Sections 236 through 240 of Title 20 of the United States Code and all other revenues available to the school district in determining the level of federal support for the school district for the sixty-fourth and succeeding fiscal years, the state equalization guarantee distribution for school districts receiving funds under this subsection shall be computed as follows:

$$\frac{\text{fiscal year program cost excluding special education for the year for which the state equalization guarantee distribution is being computed}}{\text{prior fiscal year program cost excluding special education}} \times \text{prior fiscal year state equalization guarantee distribution excluding special education}$$

plus special education funding in accordance with Paragraphs (1) and (2) of Subsection D of this section and Section 22-8-21 NMSA 1978 plus an amount that would be produced by applying a rate of eight dollars forty-two and one-half cents ($8.425) to each one thousand dollars ($1,000) of net taxable value of property as defined in the Property Tax Code [Articles 35 to 38, Chapter 7 NMSA 1978] for property taxation purposes in the school district and to each one thousand ($1,000) of the assessed value of products severed and sold in the school district as determined under the Oil and Gas Ad Valorem Production Tax Act and the Oil and Gas Production Equipment Ad Valorem Tax Act equals the fiscal year state equalization guarantee distribution for the year for which the state equalization guarantee distribution is being computed.

If at any time grants from the federal government as assistance to those areas affected by federal activity authorized in accordance with Sections 236 through 240 of Title 20 of the United States Code (commonly known as "PL 874 funds") are reduced or are no longer available, the state equalization guarantee distribution shall be computed by the formula contained in this subsection plus an increase by fifty percent of the amount the prior year's PL 874 funds exceed PL 874 funds for the year for which the state equalization guarantee distribution is being computed.

22-8-30. Supplemental distributions.

A. The director shall make supplemental distributions only for the following purposes:

(1) to pay the out-of-state tuition of students subject to the Compulsory School Attendance Law [22-12-1 to

22-12-7 NMSA 1978] who are attending school out-of-state because school facilities are not reasonably available in the school district of their residence;

(2) to make emergency distributions to school districts in financial need, but no money shall be distributed to any school district having cash and invested reserves, or other resources or any combination thereof, equaling five percent or more of the school district's operational budget;

(3) with the approval of the state superintendent, to make program enrichment distributions in the amount of actual program expense to school districts for the purpose of providing specific programs to meet particular educational requirements that cannot otherwise be financed;

(4) with the approval of the state superintendent, a special vocational education distribution to area vocational schools or state supported schools with state board approved vocational programs to reimburse those schools for the cost of vocational education programs for those students subject to the Compulsory School Attendance Law who are enrolled in such programs; and

(5) with the approval of the state superintendent, to make emergency capital outlay distributions to school districts that have experienced an unexpected capital outlay emergency demanding immediate attention.

B. The state superintendent and director shall account for all supplemental distributions and shall make full reports to the governor, legislative school study committee and legislative finance committee of payments made as authorized in Subsection A of this section.

C. The director may divert any unused or unneeded balances in any of the distributions made under the direc-

tor's supplementary distribution authority to make any other distribution made pursuant to the same authority.

22-8-35. Tax anticipation certificates.

A. For operating expenses, a local school board with the consent of the chief [director of public school finance] may anticipate the collection of taxes for which tax levies have been made by issuing and selling certificates of indebtedness. These certificates shall be issued on the faith and credit of the school district issuing the certificates. The certificates shall not bear interest in excess of six percent a year. The total uppaid certificates outstanding shall not exceed the budget allowance for operating expenses of the school district for a period of ninety days. The certificates shall be paid out of the money first credited thereafter to the operating fund of the school district.

B. For school building construction, repair or both, a local school board with consent of the chief [director] may anticipate the collection of taxes for which tax levies have been made for that purpose by issuing and selling certificates of indebtedness. These certificates shall be issued on the faith and credit of the school district issuing the certificates. The certificates shall not bear interest in excess of six percent a year. The certificate shall be paid out of the money first received under the tax levy.

22-8-37. Public school funds.

Except money received for a cafeteria or for an activity fund, all money for public school purposes distributed to a school district, or collected by a county, school district or public school authorities for a school district shall be delivered to and kept by a county treasurer or a board of fi-

nance of a school district in funds approved by the division. Disbursements from these funds shall only be made for matured debts by voucher and warrants or checks of the local school board. In no event shall any money be expended or debts incurred except as authorized by the Public School Finance Act [22-8-1 to 22-8-42 NMSA 1978]. Money for a cafeteria or for an activity fund shall be deposited in a bank or banks or in a savings and loan association whose deposits are insured by an agency of the United States, approved by the local school board. The local school board may deposit any cafeteria funds, any activity funds or any other funds in one or more accounts with any such bank or insured savings and loan association in its county but no local school board, in any official capacity, shall deposit any cafeteria funds, any activity funds or any other funds in any one such savings and loan association the aggregate of which would exceed the amount of federal savings and loan insurance corporation insurance for a single public account.

22-18-9. Approval of bond issue by attorney general.

No issue of bonds shall be valid or binding on any school district unless prior to the issuance of the bonds the attorney general approves the bond issue as to form and legality. The written approval of the attorney general shall be made a part of the transcript of the proceedings in connection with each bond issue. The local school board of each school district proposing to issue bonds shall provide the attorney general with all information necessary for this consideration of the form and legality of the bond issue.

22-19-6. Report to state board.

Prior to borrowing any money to finance an income project, a local school board shall furnish to the state board the following information:

A. a detailed description of the income project;

B. an explanation of the necessity for the income project;

C. an estimate of the total cost of the income project;

D. an estimate of the amount of income anticipated from the income project;

E. an estimate of the amount of income from existing buildings, improvements or facilities that will be pledged to pay for the income project;

F. an estimate of the yearly operating cost of the income project; and

G. an estimate of the anticipated yearly net income from the income project.

22-19-7. State board approval; determination by state board.

A. A local school board shall obtain written approval of the state board before it borrows money, issues bonds or other special obligations, or executes mortgages, deeds of trust or security agreements for financing an income project pursuant to the School Revenue Bond Act [22-19-1 to 22-19-16 NMSA 1978].

B. Prior to giving written approval to an income project, the state board shall determine that the income project is necessary and that sufficient income will be produced by the income project to repay all money borrowed and to discharge any bonds or other special obligations issued for the repayment of the money borrowed.

22-19-8. Records; restriction on use of income.

A. A local school board shall retain complete and accurate records of:

(1) the net income from the income project; and

(2) the operating costs of the income project.

B. All income from the income project shall be used solely for the following purposes:

(1) to pay the principal, interest and service charges on any bonds or other special obligations issued pursuant to the School Revenue Bond Act [22-19-1 to 22-19-16 NMSA 1978]; and

(2) to pay the operating costs of the income project.

22-20-1. School construction; approval of chief [director of the office of education].

A. Each local school board shall secure the approval of the chief [director of the office of education] prior to the construction or letting of contracts for construction of any school building or related school structure, or before reopening an existing structure which was formerly used as a school building but which has not been used for that

purpose during the previous year. It shall not be required to obtain approval from the chief [director] for enlarging an existing attendance center which is now in use unless the enlargement is for the purpose of changing the character of the attendance center from an elementary school to a secondary school, or adding an elementary school to a secondary school or a secondary school to an elementary school. A written application shall be submitted to the chief [director] requesting approval of the construction. The chief [director] shall prescribe the form of the application which shall include the following:

(1) a statement of need;

(2) the anticipated number of students affected by the construction;

(3) the estimated cost;

(4) a description of the proposed construction or structure to be built; and

(5) a map of the area showing existing school attendance centers within a five-mile radius, and any obstructions to attending the attendance centers, such as, but not limited to railroad tracks, rivers and limited-access highways.

B. The chief [director] shall give his approval to an application if he reasonably determines that the construction will not cause an unnecessary proliferation of school construction; that the construction is needed in the school district; that the construction is feasible; that the cost of the construction is reasonable; and that the school district is financially able to pay for the construction.

C. Within thirty days after the receipt of an application filed pursuant to this section, the chief [director] shall, in writing, notify the local school board making the application of his approval or disapproval of the application.

22-20-2. School building construction; distance from highways.

A. No local school board shall construct, or cause the construction of, any public school building within four hundred feet of any main artery of travel without the prior written approval of the state board.

B. The district court may enforce the provisions of this section by any appropriate civil remedy in an action brought by an interested party.

C. As used in this section, "main artery of travel" means any designated state or federal-aid highway used primarily to accommodate transient motor traffic through a municipality and any type of public highway used primarily to accommodate transient motor traffic through a rural community or area.

22-20-3. School construction; approval of state board.

A. Each local school board shall secure approval of the state board for plans and specifications for the expending of twenty-five thousand dollars ($25,000) or more on erecting, remodeling or making additions to any public school building or structure when state capital outlay funds have been awarded to the local school board to underwrite any of the project costs. When the project costs

have been derived from locally authorized and issued general obligation bonds, the authority of the state board shall be that of review and recommendation concerning the plans and specifications. The state board shall only approve or review and recommend factors relating to educational aspects of the construction.

B. Any contract to expend money pursuant to plans and specifications not approved as provided by this section is void and constitutes no charge in law or equity against the local school board or the school district.

41-4-4. Granting immunity from tort liability; authorizing exceptions.

A. A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978.

B. Unless an insurance carrier provides a defense, a governmental entity shall provide a defense for any public employee when liability is sought for:

(1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or

(2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

C. A governmental entity shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America, if the public employee was acting within the scope of his duty.

D. A governmental entity shall pay any settlement or any final judgment entered against a public employee for:

(1) any tort which was committed by the public employee while acting within the scope of his duty; or

(2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico, which occurred while the public employee was acting within the scope of his duty.

E. A governmental entity shall have the right to recover from a public employee the amount expended by the public entity to provide a defense and pay a settlement agreed to by the public employee or to pay a final judgment if it is shown that while acting within the scope of his duty, the public employee acted fradulently or with actual intentional malice causing the bodily injury, wrongful death or property damage resulting in the settlement or final judgment.

F. Nothing in Subsections B, C and D of this section shall be construed as a waiver of the immunity from liability granted by Subsection A of this section or as a waiver of the state's immunity from suit in federal court under the eleventh amendment to the United States constitution.

G. The duty to defend as provided in Subsection B of this section shall continue after employment with the governmental entity has been terminated, if the occurrence for which damages are sought happened while the public employee was acting within the scope of duty while the public employee was in the employ of the governmental entity.

H. The duty to pay any settlement or any final judgment entered against a public employee as provided in this section shall continue after employment with the governmental entity has terminated, if the occurrence for which liability has been imposed happened while the public employee was acting within the scope of his duty while in the employ of the governmental entity.

41-4-20. Coverage of risks; insurance.

A. It shall be the duty of governmental entities to cover every risk for which immunity has been waived under the provisions of the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] or any liability imposed under Section 41-4-4 NMSA 1978 as follows:

(1) local public bodies shall cover every such risk or liability as follows:

(a) for a risk for which immunity has been waived pursuant to Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978, the local public body shall cover the risk, and for any commercially uninsurable risk for which public liability fund coverage is made available, the local public body may insure the risk in accordance with the provisions of Section 41-4-25 NMSA 1978;

(b) for excess liability for damages arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America, the local public body shall provide coverage in accordance with the provisions of Subsection B of Section 41-4-27 [41-4-28] NMSA 1978, if coverage is available; and

(c) for a risk or liability not covered pursuant to Subparagraphs (a) and (b) of this paragraph, the local public body shall purchase insurance, establish reserves or provide a combination of insurance and reserves or provide insurance in any other manner authorized by law; and

(2) for state agencies, the risk management division shall insure or otherwise cover every such risk or liability in accordance with the provisions of Section 41-4-23 NMSA 1978. Coverage shall include but is not limited to coverage for all such liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America.

B. The department of finance and administration shall not approve the budget of any governmental entity that has not budgeted an adequate amount of money to insure or otherwise cover pursuant to this section or Section 3-62-2 NMSA 1978 every risk of the governmental entity for which immunity has been waived under the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978. The public school finance division of the department of finance and administration shall not approve the budget of any school district which has

failed to budget sufficient revenues to insure or otherwise cover pursuant to this section every risk for which immunity has been waived pursuant to the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978.

C. No liability insurance may be purchased by any governmental entity other than as authorized by the Tort Claims Act.

41-4-28. Coverage for liability subject to foreign jurisdiction's law.

A. Coverage which may be provided for liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America, is not limited as provided in Section 41-4-19 NMSA 1978.

B. The risk management division shall purchase liability insurance coverage for all local public bodies otherwise participating in the public liability fund for liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America. The risk management division shall purchase such liability insurance only if the director of the risk management division determines that the coverage offered is satisfactory and available at reasonable cost. Such liability insurance shall provide coverage only for amounts in excess of the limits set forth in Section 41-4-19 NMSA 1978.

Local public bodies shall obtain excess coverage for such foreign jurisdiction liability by paying into the public liability fund an assessment, determined by the director of the risk management division, based on the cost of the insurance and the risks to be insured. If such insurance is unavailable on a satisfactory basis or at reasonable cost, local public bodies shall cover such liability in accordance with Subparagraph (c) of Paragraph (1) of Subsection A of Section 41-4-20 NMSA 1978.

C. Nothing in this section shall be construed as a waiver of any sovereign or governmental immunity.